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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LUIS GRANT, Defendant and Appellant.	H035295 (Santa Clara County Super. Ct. No. CC938085)

I. INTRODUCTION

A jury convicted defendant Michael Luis Grant of three counts of forcible lewd conduct on a child under the age 14. (Pen. Code, § 288, subd. (b)(1).)[1] Defendant was sentenced to 18 years in prison.

On appeal, defendant contends that 1) the trial court erred by allowing expert testimony concerning domestic violence, 2) the court erred by failing to instruct the jury with CALCRIM No. 1193 regarding testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS), 3) the court erred in instructing the jury with CALCRIM No. 371 concerning a defendant's awareness of guilt, 4) the prosecutor committed misconduct in argument to the jury, 5) defense counsel had a conflict of interest that adversely affected the defense, and 6) cumulative error warrants reversal.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Defendant was charged by information with six counts of forcible lewd conduct on a child under the age 14. (§ 288, subd. (b)(1).) The alleged victim of counts 1 through 3 was defendant's wife's sister, I. Doe, and the alleged victim of counts 4 through 6 was defendant's daughter, M. Doe.

B. *The Evidentiary Rulings*

Prior to trial, the prosecutor indicated that defendant's wife, R., would be a witness in the case, and the prosecutor intended to introduce evidence about defendant's history of domestic violence against R. in order to "explain her actions." The prosecutor also intended to introduce expert testimony regarding the "impact" of domestic violence on a person and regarding CSAAS. Defendant filed a motion in limine seeking to exclude expert testimony concerning domestic violence and CSAAS. After a hearing, the trial court ruled that it would allow expert testimony concerning domestic violence and CSAAS, and that as to the expert testimony concerning domestic violence, it would hold an Evidence Code section 402 hearing to determine the "parameters" of that expert testimony.

During trial after most of the prosecution's witnesses, including R., had testified, and outside the presence of the jury, the court held an Evidence Code section 402 hearing concerning expert testimony on domestic violence. The prosecutor made an offer of proof as to the areas of inquiry that the prosecutor intended to pursue, which included the effect of domestic violence on a battered person's thinking. Defense counsel objected to the witness's testimony as "peripheral and collateral and unnecessary." The court ruled that it would allow the testimony. The court explained that the expert witness could "add some light and some expertise in the area of domestic violence victims," and referred to

defendant's domestic violence against R. and the fact that R. "testified favorably for him in this trial and recanted prior domestic violence."

C. *The Prosecution's Case*

1. Lay Witness Testimony

At the time of trial in November 2009, I. was nine years old and in the fourth grade. I. lived with her older sister R., their mother Anna, R.'s nine-year-old daughter M., and R.'s one-year-old son J.

R. and defendant married in July 2006. Defendant is the father of M. and J. R. and defendant lived together for a few months sometime before they married, and then for approximately three or four months after they were married. After the two stopped living together, defendant lived at a residence with his parents and sister, or at a residence with his grandparents.

I. and M. sometimes visited defendant on the weekends at his parent's house. I. testified that defendant would drag her to another room with a bed or a couch, get on top of her, put his penis on her "private," and move up and down. I. could not get away because defendant held her down. On one occasion, I. and M. were on a bed watching television at defendant's grandmother's house when defendant came into the room. He grabbed I.'s legs, pulled her towards him, put his penis on her "private," and went up and down. M. jumped on defendant's back in an attempt to get him off I., but he pushed M. away. Defendant never pulled his or I.'s pants down. These incidents occurred about 10 times when I. was in the second and third grades. On another occasion, defendant chased I. around a couch, grabbed her, and moved up and down with his penis on her butt. I. had tried to get away. Defendant also put his hand inside I.'s shirt once and moved his hand around her chest. I. tried to get away, but defendant held onto her. I. did not tell anyone about the incidents because she was scared, thought it was her fault, and thought she would get in trouble. She eventually told her mother that defendant had done "nasty things."

M. testified that defendant did "nasty things" to I. and her. When M. and I. were in the third grade, M. saw defendant "open" I.'s legs, "get on top of her," and "go up and down." I. tried to push him off, and M. jumped on him and tried to get him off. M. also testified that defendant would "get on top" of her and move "up and down" with their "privates" touching while they were clothed. The "nasty things" by defendant happened when they were wrestling and lasted 10 or 20 seconds. They occurred at least three times at defendant's parents' house or at his grandmother's house. M. tried to get away but "it was difficult to push him off." M. told defendant to "stop" and he sometimes did. Defendant told M. not to tell her mother R. what had happened. M. did not tell anyone because she was afraid she would get in trouble and her mother would hit her. She eventually told her grandmother (who is also the mother of I. and R.), after her grandmother asked if defendant did "nasty things" to her. M. also told her mother R.

The last time M. saw defendant was in approximately mid-January 2009. Defendant had moved into another house, and M. and her younger brother J. went to visit him. M. was told that the house belonged to someone named "Nicole." After the visit, M. told her mother R. that defendant had moved in with "Nicole." R. asked M. questions about "Nicole," including what she looked like. R. eventually determined that defendant had lied about "Nicole" and that the person was really Lisa Duncan. R. was angry and upset that defendant had resumed a relationship with Duncan, and she expressed her anger to M. while I. was present. M. was also "a little angry."

Sometime thereafter, the police were contacted about M.'s and I.'s claims against defendant. On February 1, 2009, the girls were interviewed at their house by the police. The girls were subsequently interviewed on or about February 9, 2009, at the child interview center by San Jose Police Detective Brian Alexander. Audio recordings of the February 1 interviews and video recordings of the February 9 interviews were played for the jury. During the February 9 interview, I. stated that R. had told her about an incident in which defendant had his "private on [I.'s] butt" while the two were at a condominium.

When R. walked into the room and asked defendant what he was doing, he "fix[ed] his private." During the February 9 interview and subsequently at defendant's trial, I. stated that she did not remember this particular incident involving defendant. At trial, I. testified that R. "said she just said that so [defendant] could get more in trouble." During the February 9 interview with police, I. also indicated that defendant would "put his private on [her] private" and "rub it." When asked by the police "how long" defendant did this, I. stated, "I don't know. That's what my sister told me . . . ."

In March 2009, defendant was in custody in this case. Sometime thereafter, Dan Fehderau, a deputy district attorney, was assigned to cover a bail hearing in the case against defendant. The defense had raised the theory that the children had been influenced by R. Fehderau testified that, after the bail hearing, R. told him that the idea that she was influencing the girls or manipulating their disclosure was wrong. R. also said that the girls first reported defendant's conduct to M.'s grandmother.

Several of defendant's recorded jail calls to R. between May and June 2009 were played for the jury. At the time defendant made at least some of the calls, a court order in a different case involving domestic violence prohibited defendant from contacting R. In June 2009, R. got the order changed to allow peaceful contact. R. had submitted a letter in that case stating that she "strongly believe[d]" she was "at fault" for defendant's actions in that case.

In a May 26, 2009 call, R. told defendant that she was "shocked" to hear the claims against him and that she "believe[d] the girls totally." Defendant insisted that R. knew it was "not . . . true," and accused her of "doing this" because of Lisa Duncan. R. denied defendant's claim. Later in the call, R. told defendant that she had already "let [him] go," but that she would "always have love" for him "no matter what." She also stated that defendant, "the girls, and God" know "what really happened," and that "it is true, because these are what the girls are saying." R. denied "brainwashing" the girls or telling them what to say. She also told defendants to not "try to manipulate" her.

In a June 4, 2009 call, R. told defendant that he "better unblock [her] visits." Defendant responded that she had to "prove" herself to him and start "doing things" for him "right now." He asked, "This is your family you're fighting for, right, [R.]?" R. indicated that the district attorney had already talked to her, but she suggested to defendant that she could "make it seem like [she was] lying." Before the call ended, the two expressed their love for each other.

In a June 10, 2009 call, defendant asked R. whether she was "willing to do what it takes," and she responded affirmatively. Defendant eventually told R. that, "if the prelim goes bad, I'm looking at 25 to life."[2] R. asked what she could do. Defendant indicated that if the testimony by the girls was consistent with what they first reported, "it's all bad." R. then stated that she was "trying to see what is it that I can do where it won't be the same thing . . . ." The two then discussed "the other thing" that R. could do, and the "worst thing" that R. would face as a result would be a lawsuit by defendant. R. asked, "if that's the case, what is [it] that I needed to do and by when [sic] . . . ?" At the end of the call defendant told R. to meet with his lawyer.

In another June 10, 2009 call, defendant told R. that he felt like she wanted to do "what's right" and he told her, "don't disappoint me." R. indicated that she would not disappoint him. Defendant tried to reassure R. that he would not sue her, and stated that the "worse thing" she would face might be "trouble for filing . . . a false police report." He told R. that she was not the one who filed the report, however, and that at least he "could come home on this . . . ." Defendant expressed his hope that R. would talk to his counsel, who would have an investigator present as a witness during the meeting. Defendant told R. that "he's gonna be looking for what you told the girls . . . ." He also told R., "So, it's like it's either that or nothing and I mean if you're not gonna go with that, then you might as well just forget about it." Defendant indicated to R. that if the

[2] At trial, the jury was informed, based on a stipulation by the parties, that the charges against defendant "do not carry a penalty of 25 to life or life in prison."

girls repeat at the preliminary examination what they had already stated, then he faced "serving a life penalty." When R. expressed reservation, defendant told her that she was going to have to "figure out" whether her family was "more worth it." R. later indicated that I. would likely be asked whether she was told by R. to say certain things. Defendant responded that I. had already referred to R. in answering a couple of questions at the child interview center. R. stated, "Really, I just -- that's funny."

Another call from June 10, 2009, included a discussion by R. about the girls being told to say " 'I don't know' " and " 'I don't remember' " when questioned in court. R. stated to defendant, "It's really hard to manipulate kids, you know what I mean?" Later in the call, defendant indicated that he wanted to be there for his kids, and that R. was "taking it from" him. He told R., "I've always wanted us together," "it's all in your hands," and "your family is what you make of it." R. later indicated that she was going to talk to defense counsel and that she was going to "do [her] part." Defendant responded, "you've got me babe. If you can do this for us dude I'm so down for you."

In a June 12, 2009 call, R. stated that she would "make sure" that defendant did not "go behind bars for 25 years." She explained to defendant that she had talked to M. about whether M. wanted her father to get " '25 years to life,' " and M. indicated that she did not. R. then instructed M. to say " 'I don't know' " or indicate that she did not want to talk if someone asked her about the incidents involving defendant. R. also told defendant that she was on his side, that she forgave him, that "sometimes if you're on drugs . . . things happen," and that it was "totally different" if a child "got raped."

On June 16, 2009, in the late afternoon, R. met with defense counsel and an investigator. R. testified that, at the meeting, she was told to tell the truth. R. told them she "made everything up and convinced the girls to basically say the defendant did nasty things to them." After the meeting, defense counsel told R. to tell the truth to the prosecutor, which R. understood to mean that she should tell the prosecutor what she had just told defense counsel.

On June 23, 2009, Detective Alexander interviewed R. at the house where she lived with her mother. R. denied telling M. and I. to lie. Subsequently, on July 1, 2009, R. told Detective Alexander that she had put M. and I. up to falsely saying that defendant was doing nasty things to them. The girls had previously provided details to the detective during an interview. When Detective Alexander asked R. for specific details about what she had told the girls, R. "was very vague, she began to stutter," and her conversation with the detective was "very different" than any of their prior conversations. She also said, " 'I don't know what [I.] and [M.] told you, I never read the police report but those are the things I told them to say . . . .' "

Defendant's preliminary examination took place on July 8 and 9, 2009. At trial, I. testified that before defendant's preliminary examination, she received a letter from her sister, R., concerning what I. should say in court. A copy of the letter was admitted into evidence at trial. R. told I. that the letter contained the real truth when it actually did not. R. wanted I. to lie about defendant's conduct, so that he "could get out" and see his son. R. told I. to read the letter and "practice it" with M. I. told her mother about the letter, which was under R.'s mattress.

M. similarly testified at trial that, before defendant's preliminary examination, she received a paper from her mother R. concerning what M. was supposed to say. R. wanted M. and I. to say that defendant did not do anything nasty to them, and she wanted I. to use the paper to "test" M.

At trial, R. acknowledged that she told I. to "share" the sheet with M. She did not tell defense counsel that she was going to make this sheet for the girls regarding their testimony in court.

Defendant has a history of domestic violence with R. R. testified that defendant is eight inches taller than her, and weighs approximately twice as much as her. In 2002, defendant pushed R. "with force" while she was holding M. and both females fell. Defendant was on probation for domestic violence thereafter. In October 2006,

defendant "head butted" her during an argument. Sometime after J. was born in 2008, R. falsely told defendant that J. was not his son. R. and defendant had an argument thereafter, and defendant called her a " 'ho, bitch,' and 'slut.' " R. then falsely reported to the police that defendant had threatened to kill her. R. made the statements in order to get defendant "locked up."

R.'s cousin testified that R. had described an occasion when defendant slapped her during a game of Monopoly. R. then hit defendant, and he slapped her again. R.'s cousin also testified that defendant had told her there were times when he would watch R.'s window until 4:00 a.m. or 5:00 a.m. Defendant was jealous and wanted to make sure R. was not with somebody.

At trial, R. testified that she loves defendant and wants to continue being married to him. R. testified that she had lied to the police in February and June 2009, and that she also told her daughter M. and her sister I. to lie to the police. R. testified that she was angry and upset after learning that defendant was seeing Lisa Duncan, and expressed her feelings to M. while I. was present. R. wanted defendant to "get in trouble" and wanted him "away from Lisa." She testified that she "made" the girls "believe that it happened." According to R., defendant would wrestle and tickle the girls and nothing improper occurred. However, she told the girls that defendant was doing "nasty things" to them and putting his " 'private part . . . on your private part.' " She further told I. to tell their mother.

R. testified that she later felt "bad" about "ma[king] the girls believe that [defendant] molested them" when she heard "something about" defendant facing a 25-year-to-life sentence. The first time that R. disclosed that she had influenced the girls was during the meeting in defense counsel's office. She was scared of her mother learning that she had put the girls up to this.

R. testified that she talked to defendant frequently while he was in jail. It was common for him to call her two to four times a day, and they would talk for the entire

time allowed. R. paid for all of defendant's calls to her. At trial, she admitted that she lied on jail visitation logs by writing down the name of defendant's cellmate when in fact she was visiting defendant.

R.'s cousin testified that she talked "quite a bit" with R. and that, after defendant was arrested, she talked to R. almost every day. R. initially told her cousin that she believed the girls. R. also told her cousin about an incident in 2007 involving defendant. R. had left the two girls with defendant at a condominium. When R. returned, she walked into a room and saw defendant behind I., who was bent over. When defendant saw R. walk into the room, he "jumped off [I.] and adjusted his . . . penis."

R.'s cousin testified that she noticed a "change" in R. after R. started communicating with defendant in jail. Although R. initially stated that she believed the girls, after she talked to defendant she changed her story. R.'s cousin eventually learned that R. had talked to defendant's lawyer. When the cousin asked R. why she went and lied to defendant's lawyer, R. responded, " 'I fucked up, I fucked up.' " The cousin interpreted the response to mean that R. had lied to the lawyer. R. told her cousin that she got scared after hearing that defendant might receive a 25-year-to-life sentence. At some point, however, R. also indicated to her cousin that she made the girls believe that what defendant did to them was "nasty" or "something wrong." After R. learned that her cousin had talked to the police, R. told her cousin that she (R.) was in "trouble now." R. told her cousin that her cousin had "back stabbed" her. The cousin took this to mean that R. had trusted her with personal secrets, which the cousin had disclosed to others. With respect to the paper that R. made for the girls prior to defendant's preliminary examination, R. told her cousin that she was "preparing" the girls for court. According to R.'s cousin, R. stated that she would ask the girls questions and they would provide answers, which R. wrote down on the paper.

2. Expert Witness Testimony

Mary Ritter, a physician's assistant and sexual assault response team examiner at Santa Clara Valley Medical Center, testified that she did not find anything "abnormal" in her vaginal examinations of I. and M. in March 2009. She explained that the absence of evidence of penetrating trauma does not rule out the possibility of prior sexual contact. Ritter testified that the girls were brought in for examinations by their mothers, as opposed to being referred by the police or child protective services.

Carl Lewis, a private investigator and retired police officer, testified as an expert on CSAAS. Lewis did not know defendant or the specific charges in the case, and had not been told about the specific facts of the case. Lewis testified about the five categories of CSAAS: secrecy, helplessness, entrapment and accommodation, delayed conflicted unconvincing disclosure, and retraction. Lewis cautioned that the categories are not present in every case of abuse, and that CSAAS is "not a tool for discerning whether a child is telling the truth" about being abused. He explained that CSAAS is "background information" and is "intended to dispel some commonly held myths about child sexual abuse as an occurrence and child sexual abuse victims in particular."

Jenny August Adler, volunteer and counseling coordinator at the YWCA of Silicon Valley Rape Crisis Center, testified as an expert in "coping behaviors of victims and intimate partner and family battering and its effects." She did not read any reports or listen to any tapes in defendant's case, and she did not know anything about the facts of the case.

Adler explained that there is a "cycle of violence" in a "domestic abuse relationship." The relationship starts with a "hearts and flowers" stage where both parties put their best foot forward. Tension builds in the relationship, leading to an explosion and the display of some type of violence. The abuser will often apologize and make promises, leading to the hearts and flowers stage again.

In domestic abuse relationships, one partner continuously has more power and control in all the different areas of the relationship, whereas in most relationships, the partners have power and control in different areas, such as finances and the social calendar, but ultimately there is equality. Power and control may be taken away from a partner in different ways, including through physical or verbal abuse. This power dynamic may occur in a dating relationship and may occur between family members.

Jealously is part of many domestic abuse relationships and may be used as an excuse to monitor or isolate the victim from others. The victim may also be jealous of the abuser, "because of insecurity created by the power and control difference." Victims often have very low self esteem because of the abuse, and "[f]requently they feel like they aren't worth anything unless they are with the abuser."

It is very common for domestic violence victims who report violence within the family to later deny it, downplay it, or lie for the abuser. Statistics reflect that a victim leaves an abusive relationship seven times before the victim is "able to really disconnect from that relationship." In the cycle of abuse, when the victim is reconciling with the abuser, "very often they're going back into that hearts and flowers stage" and the victim does not want to "to look at the abuse" that the victim previously experienced. There may also be a lack of support for the victim and the charges of abuse when those in the victim's social circle know the abuser but are unaware of the abuser's negative side or controlling side.

In a domestic violence relationship, coping strategies include "[l]earned helplessness," which refers to a person who has experienced ongoing abuse, is unsuccessful in getting away from the abuse, and stops trying to get away.

D. *The Defense Case*

1. Lay Witness Testimony

In 2006, defendant was living at his grandparents' house, where he had his own room. He also sometimes stayed at his parents' house, where he slept in the living room.

During the 2007 to 2008 school year when M. was in second grade, defendant lived at his parent's house the "majority of the time" although he also stayed at his grandparents' house. When M. stayed overnight at defendant's grandparents' house, she slept in a bed with defendant or in the living room with defendant's grandmother. According to defendant's grandmother, the bedroom doors were always open. When M. came over to defendant's parent's house, it was usually on the weekend and she slept with defendant's sister or mother. I. came over to defendant's parent's house "a lot" but she never stayed overnight.

Defendant's sister testified that she, defendant, M., and I. would play around. For example, defendant would be on top of his sister, M., or I. and hold the person down, while the others were jumping on each other, tickling each other, rolling around, and "just having fun." Defendant's sister also saw defendant grab M.'s or I.'s legs, and the girls would be laughing and playing. Defendant's sister never saw defendant engage in anything but "innocent horseplay" with M. during these "wrestling sessions."

Defendant's mother testified that the girls would run around her house laughing and screaming, and that defendant would run after them, tickle them, and toss them on a futon. One of the girls would then climb on his back and he would toss them off. She also saw the girls kicking their legs, screaming and laughing, while defendant was tickling them and grabbing their legs. Defendant's mother testified that she never saw I. act as though she was scared of defendant, she never heard the girls say "get off" when they were wrestling, and she never saw anything improper that caused her any concern.

Defendant's grandmother similarly saw defendant, M., and I. engage in "wrestling and playing behavior," including the two girls initiating the playing by jumping on defendant's back.

Lisa Marie Duncan testified that she had a brief romantic relationship with defendant in 2005. Duncan was told by R. to leave defendant alone. Duncan thereafter

"reconnected" with defendant a few times over the years. Most recently, Duncan and defendant began a romantic relationship in November 2008.

By January 2009, defendant had moved into Duncan's house. In mid-January 2009, defendant asked his sister to stay with them on a weekend that M. and J. were coming to visit. Defendant, his sister, and Duncan planned to tell M. that the house belonged to defendant, and that Duncan was a friend of defendant's sister named "Nicole." They did not want M. to know Duncan's real name, because they did not want R. to find out that M. was spending time with Duncan. Prior to that weekend, Duncan had been receiving emails and other messages from R. indicating that R. knew or suspected that defendant and Duncan were seeing each other. Duncan testified that during that weekend, R. called defendant "hundreds of times in a row." On Sunday, Duncan overheard an argument over the phone between defendant and R. regarding their children. After the weekend, Duncan falsely told R., at defendant's request, that she was not seeing him.

After defendant was in custody in this case, Duncan continued to talk to him on the phone and visit him in jail. Duncan testified that she loves defendant and would like to marry him and have a family with him after "this is all over." At the time of trial in late 2009, defendant was still married to R.

The defense played for the jury several of defendant's recorded jail calls to R. In a June 7, 2009 call, R. indicated that she had had a "strong feeling" that defendant was living with Duncan, and that she (R.) would have gone "crazy" if she found out that Duncan was pregnant. Defendant admitted that he had had sex with Duncan a few times. Later in the call, defendant told R. that Duncan was "hella loyal" but that his "heart" was with R.

In a call during the early afternoon on June 16, 2009, R. stated to defendant that the girls "did lie, but it just makes sense, . . . what they were saying, and . . . what I was telling them to say. But . . . the way the cops are taking it, they're taking it as like sexual

assault . . . ." Later, in the call defendant stated that he was looking forward to being together with R. and that he prayed nothing else happened. R. indicated that she did not think anything would happen, but stated, "we both know what could happen. You know . . . your threat is you ever leave me again, 'specially with Lisa, expect something like this to happen to you again." Later in the conversation R. expressed worry that defendant would go back to Duncan. When defendant tried to reassure her, R. stated, "you just better not do this to me, because expect something to happen." R. further stated that, if Duncan "ever does something stupid like this again, you might as well fuckin' kiss that bitch goodbye for good." After this call, R. met with defense counsel and the defense investigator.

In a June 17, 2009 call, R. played for defendant a voicemail that she had received from his counsel. In the voicemail, defense counsel told R. that, assuming what she had told him was true, "[p]robably the best way" was for this to "come out through the children . . . ."

In a June 25, 2009 call, R. stated to defendant, "You do this to me again with Lisa—yeah—prepare for something else to happen." She further stated, "anytime Lisa's involved I will do something to get you in trouble." Later in the call R. told defendant, "I just made them really believe that you did nasty things . . . ."

2. Expert Witness Testimony

Brian Abbott, Ph.D., a licensed psychologist and clinical social worker, testified as an expert in child development and psychology, the evaluation of the reliability and competency of investigative interviews of suspected child abuse victims, and CSAAS. With respect to interview methods that may affect the reliability of information provided by a child, Dr. Abbott explained that younger children have more difficulty identifying the source of their memories. When children are given false information about events, whether actively or through leading or suggestive questions, they may not be aware of, or

may forget about, where they obtained the information and may incorporate that false information into their memory and believe that it actually happened to them.

Dr. Abbott testified that open-ended questions are better for eliciting information from children. Research shows that "yes" or "no" questions tend to lead to more errors with respect to the information that is provided because children tend to simply answer "yes" or "no" rather than providing more detailed information. Moreover, to the extent the "yes" or "no" question contains false information, "it increases the probability of a child assenting to false or misleading information that may be contained in the question." In addition, children are generally more susceptible to coaching or leading questions coming from adults than from other children. Even if the information conflicts with the child's recollection of the event, the child will "often acquiesce to what the adult says because [children] put so much trust in what adults think and what adults say." The child may then incorporate that false or misleading information into the child's memory of the events. Repeating the same question to a child also raises an issue. "[T]ypically when children are asked the same question more than once in an interview, there is a tendency for them to interpret the repeat question as their answer being wrong to the earlier question." Thus the information provided by the child to the repeat question may be inaccurate. False information may also be provided by a child due to "negative stereotyping." If the interviewer or another person related to the child provides negative information about the suspect, "children will often elaborate on their recall of the event with false information consistent with the negative stereotype that's being presented about the suspect."

Dr. Abbott reviewed some of the materials in defendant's case, such as the recorded police interviews of M. and I. Dr. Abbott found problems with the interviews of both girls that could have compromised the reliability and accuracy of the information they provided. For example, I.'s mother was present during I.'s first interview and offered information throughout the interview. This could cause some of the information

to be incorporated into I.'s memory and could influence her disclosure. The interviewer also used leading or suggestive questions. In the subsequent interview at the child interview center, it appeared that I. responded to questions that she did not understand, and the interviewer did not follow up on possible alternative explanations for the child's allegations. During one or both of the interviews of M., alternative explanations were not explored, suggestive and leading questions were used, the same question was asked repeatedly, and "yes" or "no" questions were asked.

E. *The Verdicts and Sentencing*

The jury found defendant guilty of three counts of forcible lewd conduct on I. The jury was unable to reach a verdict on the three counts alleging forcible lewd conduct on M.

For the three counts of forcible lewd conduct on I., the trial court sentenced defendant to three consecutive middle terms of six years, for a total term of 18 years in prison. Later, on motion of the prosecution, the court dismissed without prejudice the three counts of forcible lewd conduct on which the jury was unable to reach a verdict.

III. DISCUSSION

A. *Expert Testimony Regarding Domestic Violence*

In a pretrial motion, the prosecutor stated that defendant had been convicted of domestic violence against R., and that R. in the past had tried to take the blame for, or had tried to minimize, defendant's conduct. The prosecutor indicated that he intended to introduce evidence about defendant's history of domestic violence against R. in order to "explain her actions." In addition, the prosecutor indicated that he intended to call Adler, from the YWCA, as an expert witness to "testify generally about the causes of [d]omestic [v]iolence and its impact on the behavior of [v]ictims" and not about the specifics of defendant's case. Defense counsel filed a motion in limine seeking to exclude expert testimony concerning domestic violence. Defense counsel argued that the prosecution

had failed to show how such testimony was admissible under the facts of the case and not misleading and prejudicial.

At a pretrial hearing on the matter, the prosecutor contended that Adler's proposed testimony about the impact of domestic violence and how victims sometimes behaved was relevant to R. and "why she behaved in the erratic manner." The prosecutor stated that R. had written letters to the court for sentencing in another case "trying to get the matters reduced saying it was all her fault, changing her testimony. And similarly in this case, she gave several statements to the police, and then talked to [defendant] on the phone" and "was cajoled by [defendant] into recanting again in this matter." The prosecutor also referred to the jail calls and stated that Adler "would help explain why someone would say something like, for example, 'It's not like she was raped,' referring to her own daughter, 'by her father.' [¶] And these are powerful statements that people are going to really look at and need to have explained. . . . [I]t's going to be very difficult to understand where she's coming from. And I think [Adler] will help the jury understand that." Defense counsel argued that under Evidence Code section 352, Adler's proposed testimony should be excluded. Defense counsel contended that the proposed testimony would necessitate "mini trials" on each of the prior cases involving defendant and R. Defense counsel claimed that the more serious charges were reduced, which was "consistent" with defendant's claim that R. "has been obsessed with him." The trial court ruled that Adler would be allowed to testify. The court referred to R.'s "retractions, sentencing letters to help [defendant]," and the jail calls, and explained that Adler's proposed testimony was "extremely probative for the jury to understand the syndrome of somebody who's been a domestic violence victim . . . ." The court indicated that it would hold an Evidence Code section 402 hearing before Adler testified to determine the "parameters" of her testimony.

The Evidence Code section 402 hearing was held after all the prosecution and defense witnesses, except R.'s cousin and Dr. Abbott, had testified at trial. During the

hearing, the prosecutor questioned Adler about her relevant background concerning domestic violence and then made an offer of proof as to the areas of inquiry that he intended to pursue. Those areas included the "effect" of domestic violence in a relationship on a "battered person's thinking," helplessness and coping strategies, the " 'cycle of violence,' " the "power and control wheel," recanting in the context of domestic violence, how the relationship with an abuser may play a role in the behavior of a domestic violence victim, and whether domestic violence victims reporting violence within the family thereafter deny or downplay the violence. Defense counsel briefly questioned Adler before arguing to the court that the witness's testimony was "peripheral and collateral and unnecessary." The court ruled that Adler would be allowed to testify. The court explained that the witness "can add some light and some expertise in the area of domestic violence victims," and referred to defendant's domestic violence against R. and the fact that R. "testified favorably for him in this trial and recanted prior domestic violence." The court also stated that the witness "would be able to testify to areas which can be argued by the DA of why [R.] . . . would recant any domestic violence in the past. So I think all the areas that [the prosecutor] plans to cover are relevant to this trial and to that argument."

Adler thereafter testified as an expert in the "coping behaviors of victims and intimate partner and family battering and its effects." During instructions to the jury, the trial court admonished the jury pursuant to CALCRIM No. 332 as follows: "Witnesses were in this case allowed to testify as experts and to give their opinions. So we had three of them I think. We had Carl Lewis on the syndrome and we had a lady from the YWCA and then we had the doctor, the last one. You must consider their opinions but you are not required to accept them as true or correct. The meaning and importance of any opinions are for you to decide. [¶] In evaluating the believability of expert witnesses, follow the instructions about the believability of witnesses generally that I gave you earlier. In addition, consider the expert's knowledge, skill, experience, training and

education, the reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied was true and accurate. You may disregard any opinions that you find unbelievable, unreasonable or unsupported by the evidence. An expert witness may be asked a hypothetical question . . . . A hypothetical question ask[s] a witness to assume certain facts are true and to give an opinion based on those assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude an assumed fact is not true . . . , consider the effect of that expert's reliance on that fact in evaluating the expert's opinion . . . . [¶] If the expert witnesses disagree with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which the witness relied. You may also compare the expert's qualifications."

On appeal, defendant contends that the expert testimony concerning domestic violence was "prejudicial criminal profile evidence" that had no relevance to the charges at issue, and its admission violated his rights to due process and a fair trial under the federal constitution. He also argues that the evidence should have been excluded under Evidence Code section 352.

The Attorney General responds that the trial court did not abuse its discretion in allowing the testimony and, even if its admission was erroneous, defendant was not prejudiced.

In order for expert opinion testimony to be admissible, it must be relevant. (Evid. Code, § 350.) Further, expert opinion testimony is limited to a subject matter that is "sufficiently beyond common experience" such that "the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Expert opinion testimony regarding the effects of domestic violence, or intimate partner battering, is "relevant to explain that it is common for people who have been physically and mentally abused to act in ways that may be difficult for a layperson to understand. [Citation.]" (*People v.*

Riggs (2008) 44 Cal.4th 248, 293 (*Riggs*); see Evid. Code, § 1107, subd. (a).)[3] Such testimony may be relevant to the credibility of the person who has been battered because it may assist the jury " 'by dispelling many of the commonly held misconceptions about battered women.' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1087; see also *People v. Brown* (2004) 33 Cal.4th 892, 905-907 [determining that expert testimony regarding domestic violence and its effects was admissible].)

"Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome [citation]." ' [Citation.] On appeal, we review the trial court's rulings concerning the admissibility of the evidence for abuse of discretion. [Citations.]" (*Riggs*, *supra*, 44 Cal.4th at p. 290.)

In this case, we determine that the trial court did not abuse its discretion in admitting expert testimony by Adler. Adler's testimony was relevant to the issue of R.'s credibility. Adler testified generally about domestic violence and its effect on the battered person. She described the cycle of violence and the issue of power and control within the relationship. She also explained that it is very common for victims of domestic violence to later deny or downplay a prior report of violence, or to lie for the abuser. Here, there was evidence that defendant had engaged in domestic violence with respect to R., that she had downplayed his conduct towards her in another case, and that she loved him and wanted to continue being with him. With respect to the girls' reports

[3] Evidence Code section 1107, subdivision (a) states: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge."

of lewd conduct by defendant, although R. initially indicated that she believed the girls, after many communications with defendant she later downplayed the seriousness of their reports and claimed that she had put the girls up to making false reports. The expert testimony by Adler would assist the jury in evaluating R.'s conflicting responses to the allegations concerning defendant's abuse of the girls, and whether R.'s response might have been affected by domestic abuse by defendant.

Defendant suggests that expert testimony regarding domestic violence or battered women's syndrome is admissible only in cases where it is used to prove charges of domestic violence against a defendant, or to establish a defense when the battered person is charged with killing or assaulting the alleged batterer. We do not believe this type of expert testimony is limited to such cases. For example, in *Riggs, supra*, 44 Cal.4th 248, the California Supreme Court determined that expert testimony regarding battered women's syndrome was properly admitted where it was relevant to the credibility of the defendant's wife, who testified against the defendant in his murder trial. (*Id.* at pp. 293-294; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1302 [determining that, where the defendant was on trial for lewd conduct with a child, expert testimony regarding the behavior of parents of abused children was relevant because it rehabilitated the testimony of the victim's mother who corroborated the victim's claim].)

We are also not persuaded by defendant's arguments that the expert's testimony constituted impermissible criminal profile evidence and should have been excluded as unduly prejudicial under Evidence Code section 352.

First, there was no specific testimony by Adler about the profile of a batterer or any suggestion by Adler that defendant fit the profile of a batterer. (*People v. Prince* (2007) 40 Cal.4th 1179, 1226 (*Prince*) [explaining that "profile testimony" involves an expert comparing "the behavior of the defendant to the pattern or profile" and the expert concluding "the defendant fits the profile"].) Adler testified only generally about intimate partner battering and stated that she did not know the facts of defendant's case.

(See *People v. Gadlin* (2000) 78 Cal.App.4th 587, 595 [explaining that when battered women's syndrome "is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed" in order for the syndrome to be "understood"].) Although defendant contends on appeal that the prosecutor made improper use of Adler's testimony in argument to the jury thereafter, defendant fails to cite anything in the record to suggest the trial court was aware, at the time it ruled on the admissibility and scope of Adler's testimony, of any potential improper use of the testimony by the prosecution.

Second, "profile evidence does not describe a category of always-excluded evidence; rather, the evidence ordinarily is inadmissible 'only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative.' [Citation.]" (*Prince*, *supra*, 40 Cal.4th at p. 1226.) Here, "[t]he possible undue prejudice of which defendant complains on appeal—i.e., that '[intimate partner battering] testimony involves uncharged misconduct evidence and "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged" '—would have stemmed from [R.'s] testimony about the abuse defendant inflicted on her, not the expert's testimony about the principles of [intimate partner battering]. Defendant made no objection whatsoever to [R.'s] testimony about the abuse . . . ." (*Riggs*, *supra*, 44 Cal.4th at p. 292, fn. 22.) Defendant's claim that the expert's testimony should have been excluded under Evidence Code section 352 is thus "misdirected." (*Riggs*, *supra*, 44 Cal.4th at p. 292, fn. 22.) Moreover, the jury was instructed pursuant to CALCRIM No. 332 regarding how to evaluate the testimony of the domestic violence expert.

B. *Failure to Instruct with CALCRIM No. 1193*

Prior to trial, the prosecutor indicated that he intended to introduce expert testimony regarding CSAAS. Defendant filed a motion in limine arguing that the testimony should be excluded but, to the extent the testimony was allowed, the jury should be instructed "not to use that evidence to predict a molest has been committed." After a hearing, the trial court ruled that it would allow the testimony.

At trial, Lewis testified about the five categories of CSAAS. First, secrecy "describes the fact that sexual abuse of a child occurs almost exclusively when the offender is alone or somehow isolated with the child." Second, helplessness describes a child's feelings as the child is unable to stop the abuse by an adult. Third, entrapment and accommodation refers to a child "trapped by the circumstances of sexual abuse but accommodat[ing] that circumstance by a variety of means," such as acting as if nothing is wrong or engaging in anti-social behavior. Fourth, delayed conflicted unconvincing disclosure describes the fact that there is usually a delay between the time the child suffers the abuse and when it is disclosed, the child experiences internal conflict in determining whether to disclose, and the disclosure is "usually done at a time or in a manner that makes the child seem unconvincing," such as when the child is being punished. Fifth, retraction may occur as the disclosure results in a "great deal of chaos and attention" to the child and the family, such as by child protective services, law enforcement, the criminal justice system, and the medical field, and the child feels "very uncomfortable" from all the attention.

The record on appeal does not reflect any oral discussion by the trial court and the parties regarding a jury instruction concerning CSAAS. The trial court did *not* instruct the jury pursuant to CALCRIM No. 1193, which cautions the jury that an expert's testimony about CSAAS "is not evidence that the defendant committed any of the crimes charged against [him]," and that the jury "may consider this evidence only in deciding whether or not [the victim's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of [the victim's] testimony."

On appeal, defendant contends that the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 1193, that the failure to do so violated his federal constitutional rights "to have the jury resolve, by appropriate standards of proof, all of the factual issues determinative of his guilt or innocence," and that the error was prejudicial. The Attorney General suggests that the trial court need not give the instruction unless

requested to do so and that, even it if it was required to give the instruction sua sponte, the error was not prejudicial to defendant.

In *People v. Stark* (1989) 213 Cal.App.3d 107, the appellate court stated that if *requested* by a party, the jury must be admonished as to the proper use of expert testimony concerning CSAAS. (*Id.* at p. 116.) Subsequently, in *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*), another appellate court held that the trial court has a sua sponte duty to give a limiting instruction concerning the use of CSAAS evidence. (*Id.* at pp. 958-959.) Citing *Housley*, the Bench Notes to CALCRIM No. 1193 state that the trial court has a sua sponte duty to give the instruction if an expert testifies about CSAAS.

Here, even assuming that the trial court in this case erred by failing to give CALCRIM No. 1193 sua sponte, we determine that the error was harmless under any standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

As we explained, CALCRIM No. 1193 instructs the jury that an expert's testimony about CSAAS "is not evidence that the defendant committed any of the crimes charged against [him]," and that the jury "may consider this evidence only in deciding whether or not [the victim's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of [the victim's] testimony." In this case, Lewis readily acknowledged the limits of CSAAS and did not offer an opinion about the specifics of defendant's case. Lewis testified that CSAAS is "not a tool for discerning whether a child is telling the truth" about being abused. He further admitted that CSAAS is "not a diagnosis" and that, for example, a child might retract a claim of abuse because there actually had been no abuse. Lewis explained that CSAAS is simply "background information" and is "intended to dispel some commonly held myths." He also testified that he did not know defendant and had not been told about the specific facts of the case. Lewis's testimony concerning CSAAS was accordingly

general and not directed to a particular child in this case. Defendant's own expert witness, Dr. Abbott, similarly testified that CSAAS is not a "diagnostic tool" and "cannot be used to diagnose whether a child has been sexually abused or not." We believe that this testimony by both experts in the case eliminated any risk that the jury might misuse or misapply the CSAAS evidence. (See *Housley, supra,* 6 Cal.App.4th at p. 959 [concluding that a more favorable result was not reasonably probable in the absence of the failure to give a limiting instruction regarding CSAAS evidence, because the expert told the jury she had not met the victim and had no knowledge of the case, provided testimony about CSAAS in general terms, and "described behavior common to abused victims as a class, rather than any individual victim"].) Moreover, the jury was instructed pursuant to CALCRIM No. 332 regarding how to evaluate the testimony of the CSAAS experts.

Defendant on appeal complains that the prosecutor "relied extensively upon the CSAAS evidence" in argument to the jury and used it to "explain away [I.'s] and [M.'s] delayed reporting of [defendant's] alleged molestations and their positive behavior towards [defendant]." In particular, defendant cites the following from the prosecutor's opening argument: "[T]he victim behavior is consistent with that of someone [who's] been molested. We talked a little bit about that, how they had to keep the secret, felt helpless, delayed, conflicted reporting and that fits in with what we're talking about. . . . The law allows and recognizes [CSAAS] as an appropriate area for expert testimony and it should be considered by you when you look at the girls' testimony. [¶] And most importantly it makes common sense. Explains to us why children who are abused behave the way they do and why the girls in this case behaved the way they did." Defendant observes that in closing argument, the prosecutor also argued the facts of the case in conjunction with the five categories of CSAAS.

We are not persuaded by defendant's claim of prejudice based on the absence of the CALCRIM No. 1193 instruction and the prosecutor's opening and closing arguments.

Prior to making the above-quoted argument about "victim behavior" being "consistent with that of someone [who's] been molested," the prosecutor acknowledged to the jury that CSAAS "is not a diagnostic tool. It's not something you diagnose a child with." The prosecutor's explicit recognition that CSAAS "is not a diagnostic tool" echoed both experts' testimony about the limitations of CSAAS. As we have just explained, Lewis testified that CSAAS is "not a tool for discerning whether a child is telling the truth" about being abused, that it is "not a diagnosis," and that a child might retract a claim of abuse, for example, because there actually had been no abuse. Dr. Abbott similarly testified that CSAAS is not a "diagnostic tool" and "cannot be used to diagnose whether a child has been sexually abused or not." Further, prior to the parties' arguments, the trial court had instructed the jury pursuant to the January 2006 version of CALCRIM No. 222 that it "must use only the evidence that was presented in the courtroom" in deciding the facts of the case, that the evidence included the sworn testimony of witnesses, that "[n]othing that the attorneys . . . say is evidence," and that in their opening statements and closing arguments the attorneys discuss the case "but their remarks are not evidence." Thus, even if the prosecutor's argument concerning CSAAS and its relevance to the facts of the case misapplied the experts' testimony, the jury was instructed not to consider the prosecutor's argument as evidence. Even the prosecutor in this case, after making the above-quoted argument about "victim behavior," told the jury that "[n]othing that the attorneys say is evidence" and that the attorneys' remarks in argument "are not evidence."

Moreover, the jury found defendant guilty of three counts of forcible lewd conduct involving I., but was unable to reach verdicts on the three counts involving M. To account for the verdicts as to I. but not M., where the testimony concerning CSAAS by the prosecution and defense experts was general and not regarding the specific behavior of the children in this case, the jury must have considered the relative strength of *other*

evidence concerning each girl's claims of lewd conduct against defendant, rather than relying on a blanket misuse or misapplication of the CSAAS evidence.

Accordingly, we determine that defendant was not prejudiced by any error due to the trial court's failure to instruct the jury with CALCRIM No. 1193. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836; *Housley*, *supra*, 6 Cal.App.4th at p. 959.)

C. *CALCRIM No. 371*

The trial court instructed the jury pursuant to CALCRIM No. 371 as follows: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that *he was aware of his guilt*. If you conclude the defendant made such an attempt, it is up to you to decide its meaning and importance. [¶] However, evidence of such an attempt cannot prove guilt by itself. If the defendant tried to create false evidence or obtain false testimony, that conduct may show that *he was aware of his guilt*. If you conclude the defendant made such an attempt, it is up to you to decide its meaning and importance. However evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than the defendant tried to create false evidence, provide false testimony or conceal or destroy evidence[,] that conduct may show the *defendant was aware of his guilt*, but only if the defendant was present and knew about the conduct or if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence[.] [H]owever evidence of such conduct cannot prove guilt by itself." (Italics added.)

After the jury was instructed, and outside the jury's presence, defense counsel placed on the record his objection to the instruction. Defense counsel indicated that the instruction was not warranted based on the evidence presented at trial.

On appeal, defendant contends that the references in the instruction to him being "aware of his guilt" invaded the jury's province and lowered the prosecution's burden of proof, in violation of his federal constitutional rights to a fair jury trial and due process.

According to defendant, the instruction "amounted to a mandatory presumption or burden-shifting presumption that the sexual molestation charges were true if [his] behavior was substantially consistent with what was described in" the instruction. Defendant also contends that this claim of error was preserved for appeal although it was not raised below, and that the error was prejudicial.

The Attorney General responds that defendant's argument is not supported by the language of the instruction and that it is not reasonably likely that the instruction caused the jury to misapply the law.

We will address defendant's argument on appeal that the instruction was erroneous in view of his contention that his substantial rights were affected by the instruction. (§ 1259.) In considering a claim of instructional error, "[t]he test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585 (*Andrade*).)

The California Supreme Court has approved earlier CALJIC instructions concerning a defendant's "consciousness of guilt." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102 [addressing CALJIC Nos. 2.04 regarding a defendant's attempt to obtain false testimony or fabricate evidence, and 2.06 regarding a defendant's attempt to suppress evidence]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1223 [addressing CALJIC Nos. 2.03 regarding willfully false statements by a defendant, 2.04, and 2.06]; see *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021 [addressing CALJIC No. 2.52 regarding a defendant's flight after the commission of a crime]; *People v. Mendoza* (2000) 24 Cal.4th 130, 179-181 [addressing CALJIC No. 2.52].) In this case, defendant contends that "consciousness of guilt" does not have the same meaning as being "aware of" one's "guilt." Defendant acknowledges, however, that the appellate court in *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154 (*Hernández Ríos*), in considering CALCRIM No. 372 regarding a defendant's flight after commission of a

crime,[4] determined that being "aware" of one's guilt is sufficiently similar to "consciousness of guilt" such that the instruction passes constitutional muster. (*Hernández Ríos, supra,* 151 Cal.App.4th at pp. 1158-1159.)

With respect to the instruction in this case concerning an awareness of guilt, we do not believe it reasonably likely that the jury understood the instruction as stating that, if defendant engaged in certain conduct described in the instruction, then he was guilty of the lewd conduct charges. The jury was instructed that if the defendant engaged in certain conduct, that "conduct *may* show that he was aware of his guilt." (Italics added.) The jury was further instructed that it was "*up to you* [the jurors] *to decide*" the "meaning and importance" of the conduct by defendant. (Italics added.) Moreover, the jury was explicitly instructed that "evidence of such conduct *cannot prove guilt by itself*." (Italics added.) Considering the entirety of the instruction, we do not believe it reasonably likely that the jury would have understood the instruction as a mandatory or burden-shifting presumption as urged by defendant on appeal.

The cases cited by defendant in support of his argument are distinguishable. For example, in *Carella v. California* (1989) 491 U.S. 263, the "jury was told first that a person '*shall be presumed* to have embezzled' a vehicle if it is not returned within 5 days of the expiration of the rental agreement; and second, that 'intent to commit theft by fraud *is presumed*' from failure to return rented property within 20 days of demand." (*Id.* at p. 265, italics added.) These instructions were unconstitutional because they contained "mandatory directions" that "directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which [the

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[4] In *Hernández Ríos,* the jury was instructed pursuant to CALCRIM No. 372 as follows: " 'If the defendant fled immediately after the crime was committed, that conduct may show that he was *aware of his guilt.* If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.' (Italics added.)" (*Hernández Ríos, supra,* 151 Cal.App.4th at p. 1158.)

defendant] was charged" and they "relieved the State of its burden of proof . . . ." (*Id.* at p. 266.) In *People v. Godinez* (1992) 2 Cal.App.4th 492, the jury was instructed with respect to aiding and abetting that " '[h]omicide is a reasonable and natural consequence *to be expected* in a gang attack . . . .' " (*Id.* at p. 501, some italics omitted.) The instruction was erroneous because it "usurped the factfinding role of the jury" on an element of aider and abettor liability by failing to leave to the jury "the question of whether the homicide here was a natural and reasonable consequence of the gang attack [the defendant] aided and abetted." (*Id.* at p. 502.) In *People v. Higareda* (1994) 24 Cal.App.4th 1399, the jury was instructed that " 'the aiming of a handgun or shotgun at a victim accompanied by a demand and receipt of money or personal property *amounts to* force and inferably fear, within the meaning of Penal Code 211, defining robbery as a felonious taking by force or fear.' " (*Id.* at p. 1406, italics added.) The instruction was "intrusive" with respect to the jury's factfinding role and constituted error. (*Ibid.*)

In contrast to these cases, the instruction in the present case concerning an awareness of guilt did not foreclose independent jury consideration of any element of the offenses with which defendant was charged. Under the instruction, the jury had to decide whether a predicate fact was established by the evidence, such as whether defendant tried to discourage someone from testifying against him or tried to obtain false testimony, and the jury also had to decide the meaning and importance, if any, of that evidence along with all the other evidence in the case. In considering the instruction as a whole, we conclude that it is not reasonably likely that the jury understood the instruction in a manner that violated defendant's rights. (*Andrade*, *supra*, 85 Cal.App.4th at p. 585.)

D. *Prosecutorial Misconduct*

Prior to trial, the trial court and the parties discussed the content of some of defendant's jail calls with R. The court expressed concern that defendant's trial counsel might need to be a witness in the case, due to R.'s and defendant's references to trial counsel in those calls, and the change in the "focus" or "tenor" of the discussion in the

jail calls after R. met with trial counsel. The prosecutor responded to the court's concerns by stating, "I don't intend to make any allegations regarding [trial counsel] in any way." The prosecutor explained that trial counsel had clearly stated to R. that she needed to tell him (trial counsel) the truth. The prosecutor stated that he "accept[ed] that" from trial counsel and did not intend to "make an allegation" against trial counsel.

After further discussion of the jail calls, the trial court asked the prosecutor to clarify that he was not going to suggest that the change in the tenor of R. and defendant's jail calls "was somehow a product of the meeting" between R. and defendant's trial counsel. The prosecutor indicated that he believed, and his argument to the jury would be, that defendant had "coached" R. The prosecutor stated, "I wouldn't even accuse [trial counsel] of anything like that. I don't think it's within the realm of possibility. . . . [¶] So I do not intend to make that. I don't believe [trial counsel] would even ever consider that. But I do believe the defendant would." The prosecutor later stated, "I would never accuse [trial counsel] of that. I don't think he is part of the conspiracy at all. It would be ridiculous to say that he was, and I have no intention of that at all. I do think there is a conspiracy between the defendant and [R.], however." In response to the court's question about whether "the inference is going to be out there that somehow the attorney was the one who changed that," the prosecutor responded, "I suppose that is a reasonable inference, yes, Your Honor, but it's not one I would be willing to make."

Defendant contends that the prosecutor "committed misconduct and breached his . . . commitment to the court and [defendant's trial counsel] by implying in closing argument that [trial counsel] had cooperated with [R.] in attempting to manipulate the testimonies of [I.] and [M.]." According to defendant, the prosecutor in argument to the jury "characterize[d] defense counsel . . . as an unscrupulous attorney who had been involved with [R.] . . . ." Defendant further contends that, to the extent his claim of prosecutorial misconduct is forfeited, trial counsel rendered ineffective assistance by failing to object.

The Attorney General responds that defendant has failed to show ineffective assistance of counsel because there was no basis for the trial counsel to object to the prosecutor's argument.

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*).)

" 'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*); see *Friend, supra,* 47 Cal.4th at p. 29.) Where, as here, counsel did not object at trial to alleged prosecutorial misconduct, defendant may argue on appeal that counsel's inaction violated his constitutional right to effective assistance of counsel. (*Lopez, supra,* 42 Cal.4th at p. 966.) Therefore, we will address the merits of defendant's claim despite the lack of an objection below. However, if the prosecutor's comments were not improper, there will be no basis for an objection by trial counsel and the claim of ineffective assistance of counsel must fail. (*Id*. at p. 968.)

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 337 (*Wilson*).) " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*Id.* at p. 338.) "A prosecutor is given wide latitude

during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom." (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) Further, although a defendant may single out certain comments made by the prosecutor during argument in order to demonstrate misconduct, as the reviewing court we "must view the statements in the context of the argument as a whole." (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

In this case, we do not believe that there is a reasonable likelihood the jurors understood the prosecutor's argument as an improper comment regarding the integrity of defendant's trial counsel. Consistent with the prosecutor's pretrial comments to the court, the focus of the prosecutor's argument to the jury was that defendant manipulated R. to get what he wanted, and that defendant had convinced R. to attempt to influence the testimonies of I. and M. In making this argument, the prosecutor relied partly on the content of defendant's jail calls with R. Although in the calls defendant and R. refer to her meeting with defendant's trial counsel, the prosecutor did *not* argue or suggest that counsel was somehow aware of or involved in the attempt by defendant and R. to influence the testimonies of I. and M., or was aware of or involved in the change in tenor of the jail calls. We believe the jurors likely would have understood the prosecutor's argument as indicating that trial counsel was *unaware* of the attempt by defendant and R. to influence the girls. In this regard, the prosecutor referred to a voicemail message that trial counsel had left for R., and which R. had later played for defendant during a jail call. As recited by the prosecutor during argument, trial counsel told R. in the voicemail message that, if what she had told counsel during their meeting was the "truth," in other words if she had actually put the girls up to making false allegations against defendant, then this should "come out through the girls." This voicemail message by trial counsel was consistent with R.'s trial testimony that she was told during the meeting with counsel to tell the truth and to report the truth to the prosecutor as well. R. also admitted at trial that she did not tell defense counsel that she was going to make a questionnaire for the

girls regarding their testimony in court. The evidence at trial and the argument by the prosecutor were consistent with the notion that trial counsel was unaware of the attempt by defendant and R. to manipulate the girls' testimony, that trial counsel wanted the truth from R., and that trial counsel's desire was for the truth to be presented. We do not believe that the jury would have understood otherwise from the prosecutor's argument.

Accordingly, after careful review of the prosecutor's argument as a whole, we do not believe there is a reasonable likelihood the jurors understood the prosecutor's argument as an attack on trial counsel's integrity. (*Wilson, supra,* 36 Cal.4th at p. 337.) In the absence of prosecutorial misconduct, defendant's ineffective assistance of counsel claim is without merit. (*Lopez, supra,* 42 Cal.4th at p. 968.)

E. *Defense Counsel's Conflict of Interest*

As we have explained, during pretrial proceedings the court expressed concern that defendant's trial counsel might be needed as a witness in the case, due to R.'s and defendant's references to trial counsel in the jail calls. The prosecutor indicated that he did not intend to make any allegation that trial counsel was part of the "conspiracy" between defendant and R. Trial counsel told the court that the jail calls were "going to put my credibility at issue." Counsel indicated that his investigator was present during some of counsel's conversations with R. and the investigator could testify as to the content of those conversations. The court later expressed concern that an issue regarding attorney-client privilege might arise if defendant or the defense investigator took the stand to explain some of the statements in the jail calls. The parties discussed redacting portions of the jail calls.

Later, outside the presence of the jury and before opening statements, the prosecution raised the issue of whether defendant needed to waive a potential conflict of interest with trial counsel. The prosecutor was concerned that R. or defendant might assert that trial counsel gave certain legal advice, and that a need might arise for trial counsel to testify as to what he told either person. Trial counsel explained that a defense

investigator was present when he talked to R. and the investigator could testify as a witness if necessary as to that conversation. Trial counsel indicated, however, that he would not be able to rebut or explain any private conversations that he had had with defendant without becoming a witness in the case, that counsel could be put "in a difficult position" in that regard, and that defendant "needs to hear that." Eventually the court allowed the prosecutor to address the issue of a conflict of interest with defendant. The prosecutor asked defendant whether he had "heard everything we've said about a conflict of interest," and defendant answered affirmatively. Defendant indicated that he understood that there was a potential conflict of interest with his counsel concerning whether his counsel gave legal advice to someone else. Defendant further indicated that he did not want another counsel appointed to advise him on the conflict, that he wanted trial counsel to continue representing him, and that he waived "any potential conflict regarding these matters we've been talking about this morning."

Thereafter, trial counsel stated that he "want[ed] to be clear for the record that my client knows with this waiver that I may be in a position where I cannot rebut something or some inference that might come out of these tapes." The trial court told counsel, "Why don't you tell him." Trial counsel then explained to defendant that there are "inferences that could be drawn based on what you say in the tapes and I can't be a witness in the case." Counsel stated that he could call the defense investigator "to say that we've discussed everything appropriately with [R.]" Defendant stated that he understood. Counsel further explained that there might be some references at trial to defendant's "private conversations" with counsel, and counsel could not be called to testify about those conversations if he remained as trial counsel. If defendant was instead represented by another counsel, then former counsel could be called as a witness to testify about "what's referred to in these tapes." Counsel then asked, "Do I have that right?" The court and the prosecutor responded, "Yes." Lastly, trial counsel explained to defendant that, to the extent the prosecutor "wants to argue what's in the tapes he'll be

entitled to argue it." The prosecutor asserted, "And I'm not arguing your Honor." The court responded, "I'm trying to get an answer here." Trial counsel continued explaining to defendant that this "creates a difficult situation and you'd have to waive that if we proceed." Defendant indicated that he understood and wanted to continue with current counsel.

On appeal, defendant contends that trial counsel had a conflict of interest due to the references to counsel in the jail calls between defendant and R. Defendant argues that counsel had an "actual conflict of interest between his own credibility and his duty to defend" defendant because "[t]he sequence of events" as reflected by the evidence at trial "suggested that defense counsel had been a part of [defendant] and [R.]'s plan to induce the girls to falsely recant their accusations." According to defendant, "[t]he only way to avoid some adverse effect to the defense would have been to have new counsel defend the case who had not been involved, even by inference, in the alleged plot to fabricate evidence, and whose personal credibility would thus not be affected." Defendant further contends that his waiver of a conflict of interest by counsel was "invalid and unenforceable" and of no benefit to him.

The Attorney General's responding brief on appeal does not address the issue of whether trial counsel had an actual conflict of interest. At oral argument, the Attorney General did not concede the issue.

"A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client. [Citations.] . . . 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or his [or her] own

interests. [Citation.]" ' [Citations.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*).)

A defendant's claim of a Sixth Amendment violation "based on conflicts of interest are a category of ineffective assistance of counsel claims that, under *Strickland*[*v. Washington* (1984) 466 U.S. 668] at page 694, generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. [Citation.] In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance*—as opposed to a mere theoretical division of loyalties.' [Citations.]" (*Doolin*, *supra*, 45 Cal.4th at pp. 417-418.) "[A] determination of whether counsel's performance was 'adversely affected' . . . 'requires an inquiry into whether counsel "pulled his [or her] punches," i.e., whether counsel failed to represent defendant as vigorously as he [or she] might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are … bound by the record. But where a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.' [Citation.]" (*Id.* at p. 418.)

In this case, defendant contends that his waiver of a conflict of interest was "invalid," and that trial counsel requested a "gratuitous waiver" of conflict that "went well beyond the prosecutor's and was not required by the court." Defendant contends that the waiver was of no benefit to him and that the only reason for the waiver "would have been to protect defense counsel."

Defendant fails to establish that trial counsel's representation of him was not as vigorous as it might have been had there been no alleged conflict of interest. Defendant's contention that he made a "gratuitous waiver" is not supported by the record. The record reflects that, after the prosecutor questioned defendant about a potential conflict of interest, trial counsel sought to clarify the ramifications of him remaining as counsel and the court *encouraged* counsel to go ahead and "tell" defendant about those ramifications. The court and prosecutor also *affirmed* trial counsel's subsequent explanation to defendant when counsel asked, "Do I have that right?" Further, we are unable to conclude that counsel's conduct with respect to the waiver can be attributed only to counsel's own interest. Counsel had earlier stated to the court that his client "need[ed] to hear" about the issue of counsel not being able to testify in the case if he remained as counsel. Counsel may have acted in an attempt to ensure that his client understood the perceived conflict and ramifications, without regard to "protect[ing]" himself as defendant contends on appeal. In sum, defendant fails to establish that trial counsel's representation of him was not as vigorous as it might have been had there been no alleged conflict of interest. (*Doolin, supra,* 45 Cal.4th at pp. 417, 418.)

F. *Cumulative Error*

Lastly, defendant contends that reversal is required based upon the "cumulative effect of the errors committed" at trial. The California Supreme Court has stated that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) In this case, we assumed that the trial court erred by failing to give CALCRIM No. 1193 sua sponte, and concluded that any error was harmless. We determined that defendant's other claims of error are without merit. Thus, in the absence of more than one error, we need not further address defendant's claim of cumulative error.

IV. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

_____
MIHARA, J.

_____
WALSH, J.*

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.